No. 17574

In the United States Court of Appeals for the Ninth Circuit

STATE OF OREGON, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Oregon

BRIEF FOR APPELLEE

WILLIAM H. ORRICK, JR.,
Assistant Attorney General,

SIDNEY I. LEZAK,
Acting United States Attorney,

ALAN S. ROSENTHAL,
STANLEY M. KOLBER,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

Cases:

In the United States Court of Appeals for the Ninth Circuit

No. 17574

STATE OF OREGON, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Oregon

---

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

This is an appeal from an order entered by the District Court for the District of Oregon on June 26, 1961, dismissing appellants' action for lack of jurisdiction over the subject matter (R. 53-54). Appellants sought recovery under the Federal Tort Claims Act of fire suppression costs incurred in suppressing a fire allegedly negligently started by employees of the United States. This appeal was noted on August 25, 1961 (R. 55). The jurisdiction of this Court is invoked under 28 U.S.C. 1291 and 1294 (1).

STATEMENT OF THE CASE

In September, 1957, in pursuance of a project of reforestation of its lands in the State of California, the United States Forest Service (Department of Agriculture) set a fire on those California lands (R. 13). This fire went out of control, crossed into Oregon, and burned lands in Oregon owned by the United States and other private landowners. Alleging negligence on the part of the Forest Service in setting the fire in California (R. 13), appellants brought this action under the Tort Claims Act to recover their costs incurred in suppressing the fire in Oregon (R. 14), premising their rights on Chapter 477 of the Oregon Revised Statutes which provide for recovery of such costs.

The United States moved for summary judgment, contending (1) that the complaint did not state a claim upon which relief could be granted, and (2) that the district court lacked jurisdiction over the subject matter (R. 16).

The district court dismissed the action for lack of jurisdiction over the subject matter, on the ground that the asserted claim was not for any damage to property (R. 49-52). It is from that dismissal that appellants prosecute this appeal.[1]

---

[1] Also on appeal to this Court is the identical ruling of the District Court for the Northern District of California in a Tort Claims Act suit brought by the State of California to recover expenses incurred by it in fighting the same fire. Like this case, the California suit is based on a fire suppression cost statute (California Health and Safety Code, Section 13009). *People of the State of California* v. *United States* (No. 17,534).

STATUTES INVOLVED

1. 28 U.S.C. 1346(b) provides as follows:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. The relevant provisions of the Oregon Revised Statutes are as follows:

> 477.064. *Uncontrolled fire declared nuisance.* Any fire on any forest land in Oregon burning uncontrolled or without proper action being taken to prevent its spread, notwithstanding its origin, is declared a public nuisance by reason of its menace to life and property. The spread of fire in forest land across an ownership boundary is prima facie evidence of fire burning uncontrolled.
>
> 477.066. *Duty of owner or possessor of land to abate fire; abatement by authorities.* The owner, operator and person in possession of land on which a fire exists, or from which it may have spread, or any of them, notwithstanding the origin or subsequent spread thereof on his own

or other land, shall make every reasonable effort to control and extinguish such fire immediately when its existence comes to his knowledge, without awaiting instructions from the forester, warden or ranger and shall continue until the fire is extinguished. If the owner or operator or person in possession fails so to do, or if the fire is burning uncontrolled, the forester, or any forest protective agency under contract with the State Board of Forestry for the protection of forest land against fire, and within whose protection area the fire exists, shall summarily abate the nuisance thus constituted by controlling and extinguishing the fire.

477.068. *Liability of owner or possessor for cost of abatement; lien; foreclosure.* (1) In case such owner, operator and person in possession, or any of them, shall fail to make the effort required by ORS 477.066, or where such owner, operator or person in possession is wilful, malicious or negligent in the origin of the fire, the actual cost of controlling or extinguishing the fire shall be recovered from such owner, operator or person in possession when necessary by action for debt prosecuted in the name of the State of Oregon or such forest protective agency or both.

(2) The cost in cases covered by ORS 477.066 shall constitute a general lien upon the real and personal property of such owner, operator or person in possession, but the lien shall be limited to the real and personal property situated within the external boundaries of the area over which the fire has burned. A written statement and notice of the lien, containing a description of the property and a statement of the cost, shall be certified under oath by the forester or any

warden and filed in the office of the county clerk of the county in which the lands and personal property are situated within six months after extinguishment of the fire, and may be foreclosed by suit in the manner provided by law for foreclosure of liens, for labor and material. The lien provided for in this section shall be inferior to any existing lien.

(3) Upon request of the forester, the district attorney for the district in which the lands and personal property are situated shall prosecute such action for debt or foreclose the lien in the name of the State of Oregon or such forest protective agency or both. Liens provided for in this section shall cease to exist unless suit for foreclosure is instituted within six months from the date of filing the same.

477.070. *Effect of payment of fire patrol assessment or membership in control organization.* If the owner regularly pays a fire patrol assessment on the lands described under ORS 477.068 or is a member in good standing of an organization approved by and under contract with the board, which organization has undertaken the control and suppression of fires on such land and which is actually engaged in the control and suppression of fire entering upon or burning on such land, the owner, operator or person in possession shall not be subject to the penalties prescribed by ORS 164.070, or be held as maintaining a nuisance as defined in ORS 477.064, unless he or his agent is wilful, malicious or negligent in the origin of the fire. But payment of fire patrol assessments or membership in an organization under contract with the board shall not relieve any owner, operator or person in pos-

session of land from the obligation imposed by ORS 477.066 and 477.068 to control and prevent the spread of fires if that land has theretofore become an operation area and if, as a result thereof, an additional fire hazard has been created and exists thereon and has not been released by the forester.

SUMMARY OF ARGUMENT

I

1. As the district court correctly held, appellants' claim does not come within the scope of the Federal Tort Claims Act because the complaint failed to allege an injury or loss of property, let alone sought recovery for such an injury or loss. By reason of 28 U.S.C. 1346(b), the jurisdiction of the district court is limited to claims "for injury or loss of property, or personal injury or death." This limitation applies whether or not state law would impose liability in the circumstances of the case, and plainly bars this action.

2. Appellants' assertion—advanced for the first time in this Court—that the fire which it suppressed damaged or endangered property subject to a state lien interest, as well as fish and game, watersheds and like public resources, should not be considered. Since the complaint contained no such allegation, and it was not pressed upon the district court, it is not before this Court. Further, appellants' position would not be improved if they were allowed, in effect, to amend their complaint at this juncture. For one thing, the claim would still not be "for loss or injury

of property" but for fire suppression costs. For another, appellants could not cast themselves in the role of a landowner having been required to incur expense in the protection of their own property from the consequences of another's negligence. The state's lien interest in forest lands creates no right of action in it for harm to those lands resulting from negligence, or any other similar property interest. And the natural resources which appellants now insist were endangered are not the property of appellants—or, indeed, of anyone else. Those resources are common to all, and the state has simply the power to control their use. In protecting them against fire, appellants do no more than carry out their function of providing for the general welfare. And while Congress could have provided that the Tort Claims Act remedy should embrace expenses incurred in the performance of this function, in its wisdom it chose not to do so.

II

The Tort Claims Act also does not embrace actions which are not grounded in tort. For this additional reason, the complaint was appropriately dismissed. Statutory provisions such as those of the Oregon Revised Statutes here involved do not confer rights in tort but, rather, rights having a quasi-contractual footing. For the purpose of Tort Claims Act jurisdiction, it is the nature of the right and not the label placed on it by a particular state which controls. Thus it is irrelevant here how the Oregon courts would characterize the liability of a landowner for

the cost of the assumption by the state or a quasi-public agency—to protect the general welfare—of obligations belonging to the landowner.

ARGUMENT

I

Appellants' Claim Is Not Based Upon "Injury or Loss of Property" and Therefore Is Not Within the Scope of the Tort Claims Act

By this action, appellants seek a recovery under the Federal Tort Claims Act, which, insofar as we are aware, is without precedent. Appellants here seek the recovery of expenses they incurred as public firemen, wholly unrelated to any damage to their property. We submit that the district court correctly held that appellants' claim was not within the Act.

1. The waiver of immunity from suit in tort contained in the Tort Claims Act is, of course, not unlimited. One indication of this fact is that, in 28 U.S.C. 2680, Congress expressly excluded from the ambit of the waiver many types of torts which would be actionable were a private defendant involved; *e.g.*, (in subsection (h)) assaults, batteries, misrepresentations. Within the past year, the Supreme Court invoked the misrepresentation exclusion in holding that damage resulting from a negligent FHA appraisal was not recoverable under the Act. *United States* v. *Neustadt*, 366 U.S. 696. In the course of its opinion, the Court noted that whether under state law the claim would be regarded as based upon a mispresentation "does not meet the question of whether this

claim is outside the intended scope of the Federal Tort Claims Act, which depends solely upon what Congress meant by the language it used in § 2680 (h)". 366 U.S. at 705-706. In other words, state law does not shape the boundaries of the waiver of immunity.

To be sure, none of the Section 2680 exceptions have been brought into play here. But what is involved is an even more fundamental jurisdictional provision—28 U.S.C. 1346(b), *supra*, p. 3. This is the keystone of the entire Act and unless the claim can be brought within the scope of the limited jurisdiction conferred upon the district courts by the terms of that Section, there is no occasion to consider whether it falls within any of the other exclusionary provisions of Section 1346(b).

The conditions precedent to jurisdiction contained in Section 1346(b) are several: (a) the suit must be "for money damages"; (b) the claim must have accrued after January 1, 1945; (c) the sought recovery must be "for injury or loss of property, or personal injury or death"; (d) that injury, loss or death must have been "caused by the negligent or wrongful act or omission" of a Government employee "while acting in the scope of his employment"; and (e) state law must impose liability on a private person in like circumstances.

All of these conditions must be met and, thus, the absence of but one is necessarily fatal to the claim. For example, in *United States* v. *Ure*, 225 F. 2d 709, this Court reversed judgments under the Act based upon damage sustained by the plaintiffs when a break

in a government-operated irrigation supply canal caused the flooding of their lands in Oregon. The district court recovery had been founded primarily upon the principle of absolute liability enunciated in *Rylands* v. *Fletcher*, 225 F. 2d. at 711. But, as this Court pointed out, the *Rylands* doctrine, although accepted by the Oregon courts, could not support a claim under the Tort Claims Act. This was because of the jurisdictional requirement that the claim be founded on a negligent or wrongful act or omission—a requirement that precludes the entertaining of any claim based upon absolute liability. See also *People of the State of California* v. *United States*, 146 F. Supp. 341 (S.D. Cal.).[2]

In this case, negligence on the part of Government employees is alleged. The second amended complaint, however, does not assert that, as a result of the pur-

---

[2] In that case, the State of California sought recovery under the Tort Claims Act for damage resulting from the flooding of one of its highways. The district court, per Judge Jertberg dismissed the action, relying in large measure upon this Court's decision in *Ure*. As the Court's opinion pointed out (146 F. Supp. at 344):

> The plaintiff contends that the settled law of California holds actionable a diversion and concentration of waters onto lower properties never before subjected to these waters. I do not question that under the laws of the State of California, under appropriate allegations and proof, upper land owners may become liable to a lower land owner, where the upper land owner by artificial means causes surface waters, as distinguished from flood waters, to change their natural flow and thereby cause damage to the lower land owner. However, jurisdiction of this Court must be founded upon Federal statutes and not upon State law.

ported negligence, there was "injury or loss of property". Indeed, even a cursory examination of that complaint reflects that no damage to any property of the appellants is claimed.

Instead, the gravamen of the complaint is that, as a result of the charged negligence, public firemen in the employ of appellants were called upon to extinguish a fire. And, what is sought to be recovered is simply the expenses which appellants purportedly incurred by reason of the activities of its public firemen. For a basis of entitlement to such recovery, the complaint points to Chapter 477 of the Oregon Revised Statutes (R. 49).[3] This chapter imposes

---

[3] The act of negligence upon which appellants' action rests occurred in California (R. 13-14), *i.e.*, appellants allege negligence on the part of agents or employees of the Forest Service (United States Department of Agriculture) in setting and controlling the Bogus Mountain fire. Section 1346(b) of the Tort Claims Act provides that "the law of the place where the act or omission occurred" controls. The Supreme Court had occasion to construe this provision in *Richards* v. *United States*, 369 U.S. 1. The Court held (1) that the courts must look, under Section 1346(b), to the law of the state in which the negligent act or omission occurred and (2) in looking to that law, the courts must look to the whole law, *i.e.*, the substantive as well as the conflicts of law rules of such state.

Thus, since appellants here allege an act of negligence in California, the law of California must be first applied in order to determine which law controls this case for Tort Claims Act purposes. California, following what is the majority rule, looks to the law of the place of the wrong. See 11 Cal. Juris. 2d § 79. That place would, in this case, be Oregon (*Ibid.*).

It should be noted, however, that the application of Oregon law might be giving an unintended extraterritorial effect to the Oregon statutes upon which appellants here rely. Gen-

liability for fire suppression costs upon the owner, operator or person in possession of land on which there is a forest fire, where such person is negligent in the origin of the fire or fails to make an effort to suppress the fire. ORS 477.068, *supra*, pp. 4-5. The cost of suppressing the fire may be recovered, pursuant to these provisions, by the State or the forest protective agency which fought the fire (*Ibid.*). This reimbursement is not dependent to any extent upon the fire endangering, let alone damaging, property owned by the State or the agency. Negligence, or inaction on the landowner's part, is enough.

It is readily seen upon analysis that statutes of this type confer rights of a quasi-contractual nature and that recovery under them is in no real sense recovery in tort. See pp. 17-21, *infra*. But even if a particular state were, for one reason or another, to characterize the remedy as one in tort (as Oregon is claimed to have done), and that characterization

---

erally, Oregon statutes are not intended to have such an effect. *Union Pac. R. Co.* v. *Anderson*, 167 Ore. 687, 120 P. 2d 578. And here, although the United States is a landowner in the State of Oregon, in order to reach the act of negligence alleged the Oregon statutes would have to be construed to impose their duties on the activities of the United States as the owner of land in California. It would nevertheless appear permissible for Oregon law to be applied. Cf. *Young* v. *Masci*, 289 U.S. 253, Cavers, *The Two Local Law Theories*, 63 Harv. L. Rev. 822 (1950), casenote, 71 Harv. L. Rev. 1351 (1957-58). See also *Sayles* v. *Peters*, 11 C.A. 2d 401, 54 P. 2d 94. Should, however, this Court find as a matter of construction that Oregon law does not apply, and that California law controls this case, we incorporate by reference, and make a part hereof, our brief in *People of the State of California* v. *United States* (No. 17,534).

were to be accepted,[4] it still could not provide the basis for an action under the Tort Claims Act.

In the context of the *Ure* and *Neustadt* cases, Congress could have subjected the United States to absolute liability and liability for misrepresentation where state law imposed such liability upon a private person. In its wisdom, it chose not to do so and its judgment in this regard has been given effect—as it must—irrespective of considerations of state tort law. So too, Congress could have provided that the United States should be responsible for any expenses incurred by reason of negligence of Government employees—but did not. The plain mandate of Section 1346(b) is that it is only where the governmental negligence occasions injury to person or property that the Act may be looked to as a means of redress. Stated

---

[4] That the label that the state might attach to a particular form of action is totally irrelevant was recognized by the Fourth Circuit in *Stepp* v. *United States,* 207 F. 2d 909, certiorari denied, 347 U.S. 933. In that case, the plaintiff endeavored to argue that the claim was not barred by the "assault and battery" exception in Section 2680(h) because the conduct of the Government employee did not constitute an "assault and battery" under Alaska law. Rejecting this contention, the court stated (207 F. 2d at 911):

> * * * We think, however, that where the United States excepts itself from certain liabilities, as in Section 2680 of the Federal Tort Claims Act, such exceptions must be interpreted under the general law rather than under some peculiar interpretation of a State or Territory. Stated differently, we do not think that a State may circumvent this intended exception to Government liability by merely abolishing the crime commonly known as an assault and battery and entitling such acts, instead, as a "hurting." * * *

otherwise, it was only *that* type of loss or expense that Congress felt should be recoverable judicially from the United States.

It is these considerations, we think, that explain the inability of appellants to point to a single instance in the 16 year history of the Tort Claims Act where recovery was permitted in the absence of injury to person or property. What appellants ask of this Court is a rewriting of the terms of Section 1346(b) to enable them to pursue a remedy which has been generally understood to be unavailable under the Section as enacted.

2. For the first time in the entire litigation, appellants assert in their brief in this Court (pp. 18-23) that public property was damaged and threatened by the fire. The short answer to this assertion is that it should not be considered by the Court. As above noted, appellants' complaint (R. 13-15) sought recovery solely on the basis of Oregon statutes relating to the reimbursement of expenses incurred by public firemen—and contained no allegations respecting any fire fighting activities in the capacity of landowner protecting his own property from possible damage. Likewise, the complaint did not assert damage to state property and did not ask for recovery of any such damage. What is before this Court is the question of the correctness of the dismissal of that complaint; not whether some other complaint, setting forth different allegations of fact and grounded upon some different theory of liability, might have stated a cause of action within the ambit of the Tort Claims Act.

Moreover, even with their new factual representations, appellants do not claim an entitlement to a recovery for any loss of their property. Instead, their present insistence is—as it was in the court below—that they should be given judgment simply for the expenses which were incurred in fighting the fire. Thus, whether or not their property was threatened or damaged, the claim is not for "injury or loss of property" within the meaning of 28 U.S.C. 1346(b).

While this Court need not reach the point, we think it perfectly obvious why appellants did not bring suit under the Tort Claims Act to recover for property loss. The reason is that neither appellant has a sufficient property interest in any of the resources referred to in their brief to maintain such a suit.

For example, while appellants claim (Br., p. 19) that individual *members* of the appellant Klamath Forest Protective Association owned forest lands which were burned or threatened, there is no assertion that the Association itself was the owner of such property. Any damage sustained by an Association member would, of course, have to be recovered in a suit brought by that member.

The appellant State of Oregon's claim (Br., pp. 19-22) of a lien interest in Oregon forest land stands on no better footing. The lien is created by virtue of an allocation of budgeted costs for fire protection, which costs are then assessed against forest land. These assessed costs are, by statute, a lien against the forest land (see App. Br., pp. 18-19). Such a lien creates no interest in the land to which it attaches. Cf., *Schleff* v. *Purdy, et al.*, 107 Ore. 71, 214

P. 137. Rather, it merely secures an indebtedness (*Ibid.*). The holder of such an interest, moreover, has no right to sue for the negligent damage of the property to which his lien is attached. Cf., 2 Jones on Mortgages § 859 at 178 (Eighth Ed. 1928), Anno: Remedy of Mortgagee or other holder of lien on real property against third person for damage to or trespass on property. 37 ALR 1120. Compare *Northern Pac. R.* v. *Lewis*, 162 U.S. 366.

Insofar as the now asserted threat or damage to natural resources is concerned, fish and game, watershed areas and the like are not generally regarded as property which is owned by the State. As to them, the State merely exercises "its undoubted authority to control the taking and use of that which belong(s) to no one in particular, but [is] common to all." *Geer* v. *Connecticut*, 161 U.S. 519, 529. See also *State* v. *Blanchard*, 96 Ore. 79, 189 Pac. 421, quoted at page 23 of appellants' brief.

In the final analysis, then, appellants' new theory based upon damage or threat to natural resources does not alter the situation to any extent. With or without regard to their present claim as to the significance of their fire fighting activities, the undeniable fact is that those activities were undertaken as part of the burden of the sovereign to provide for the general welfare of its citizenry. In Oregon, the burden of affording protection against fire is reflected by Chapter 477 of the Oregon Revised Statutes, which establishes a comprehensive fire control program. Participating in this program, for the benefit of the citizenry at large, is not only the appellant State,

and associations like the other appellant here, but the Federal Government itself (R. 20-48).

As previously noted, there is nothing which would have precluded Congress from permitting states, in given circumstances, to transfer the obligation for expenses incurred in the exercise of its police powers to the United States through the vehicle of the Tort Claims Act. We have seen, however, that Congress decided not to make costs involved in providing for the general welfare recoverable under the Act. The express terms of Section 1346(b) must be given their plain meaning, under which appellants can make claim only for damage to or loss of their property. Such damage is nonexistent here (or at least is not sought to be recovered) and, for this reason, the district court properly dismissed the action for lack of jurisdiction.

II

ORS 477.068 Creates a Right in Contract, Which Is Not Within the Tort Claims Act.

There is still another, independent although related, reason why this suit must fail. As its very title reflects, the Tort Claims Act was designed (with certain clearly defined exceptions) to "remove the sovereign immunity of the United States from suits in tort." See *Richards* v. *United States*, 369 U.S. 1, 6. Thus a right created by state law, in order to be within the class of rights with respect to which the Congress waived sovereign immunity, must be a right in tort. We submit that whatever right appellants have under Oregon law is a right in contract, and thus not cognizable under the Tort Claims Act. Cf.,

Drake v. *Treadwell Construction Co., et al.*, 299 F. 2d 789 (C.A. 3); *Jones* v. *United States*, 89 F. Supp. 980 (D. Iowa).

The starting point is, necessarily, that the label that a state places on a particular type of action is not determinative for Tort Claims Act purposes. See *e.g.*, *Stepp* v. *United States*, discussed n. 4, *supra*, p. 13. Thus, for example, if a state were to purport to confer a right "in tort" for a breach of contract which was negligent rather than intentional, it would scarcely follow that a Tort Claims Act suit could be maintained on such a breach of a Government contract. For it could not be said that Congress thought of that type of conduct as tortious, and thus subject to an action under the Tort Claims Act instead of the Tucker Act.

We have already suggested that, whatever the label which Oregon might have chosen to place on the right which is conferred by ORS 477.068, that right cannot be regarded as being, in any real sense, in tort. For the right comes into existence under the statute wholly independently of whether the conduct complained of gave rise to any risk at all to property of the appellants. So long as the appellants undertake to fight a forest fire which is deemed a public nuisance, they have a statutory entitlement to reimbursement of their expenses no matter how distant may be their own property (and thus remote the risk).

Where recovery is allowed of expenses involved in the performance of a general public duty owing the citizenry at large, it must be on a quasi-contractual

basis—unless a penalty rationale is involved. When public firemen attack a fire which has been negligently set, or permitted to spread, by a landowner, they are assuming an obligation which rests principally upon the landowner. Cf., ORS 477.066. Having thus bestowed a benefit upon the wrongdoer, they are entitled to obtain reimbursement under the quasi-contracts doctrine that no one shall be allowed to enrich himself unjustly at the expense of another. *Keener on Quasi-Contracts*, p. 16 (1893).

As we have developed in our brief in *People of the State of California* v. *United States* (No. 17,534), (see n. 3, *supra*, p. 11), the California fire suppression cost statute (California Health and Safety Code § 13009) is recognized by the California courts as creating rights of a quasi-contractual character. Of course, California's characterization of the nature of the right conferred by this kind of statute is no more controlling for Tort Claims Act jurisdiction purposes than is the Oregon characterization. But we submit, the view of the California courts represents the application of long-standing and well understood concepts underlying the dichotomy between actions in tort and actions having a quasi-contractual basis. See *People* v. *Zegras*, 165 P. 2d 541 (C.A. Cal.), affirmed on other grounds, 29 C. 2d 67, 172 P.2d 883; *Ventura County* v. *So. Calif. Edison Co.*, 85 C.A. 2d 529, 193 P. 2d 512.

ORS 477.068 is concededly not identical to its California counterpart. While the California statute is only operative if the fire had spread beyond the negligent landowners' property, Oregon requires simply

that the fire be "burning uncontrolled or without proper action being taken to prevent its spread." ORS 477.064. Nonetheless, the two statutes do not differ in any respect which is material here.

On the contrary, just as the California statute refers to a "charge" against the negligent landowner which "shall constitute a debt," ORS 477.068 refers to the recovery of fire suppression costs "by action for debt" and creates a lien to cover the debt. Of greater significance, under the Oregon statute as under the California statute, the negligent conduct need give rise to no risk to property of the plaintiffs. The *sine qua non* of liability under both statutes is a failure on the part of the landowner properly to assume his statutory obligations to prevent the spread of fire, with the result that a public fire fighting agency is required to assume it for him. And the measure of that liability is the expense to the fire-fighter of assuming the obligation.

For these reasons, we submit that this Court need not consider whether, as appellants insist (Br., p. 17), the Supreme Court of Oregon has affixed a label of "tort" to actions to recover fire suppression costs. Once again, what is involved here is an issue of jurisdiction under a federal statute—and its resolution is wholly dependent upon whether Congress regarded the term "tort" to apply to actions brought by public or quasi-public agencies to recover costs incurred in performing a service for the general welfare which allegedly should have been performed by the defendant. Since there is no evidence in the Act or its legislative history that Congress intended to depart

so radically from conventional notions of what constitutes a tort liability as opposed to a contractual or quasi-contractual obligation, the answer to that inquiry must be in the negative. In sum, the result here must be the same as in the *California* case, where even under state law there is no room for doubt as to the contractual nature of the right to recover fire suppression costs from the negligent landowner.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be affirmed.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

SIDNEY I. LEZAK,
Acting United States Attorney.

ALAN S. ROSENTHAL,
STANLEY M. KOLBER,
Attorneys,
Department of Justice,
Washington 25, D. C.

MAY 1962.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1962 640244 1352